No. 80-927

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In the Supreme Court of the United States

October Term, 1980

HOWARD LEE THOMAS,
Appellant,

vs.

THE HONORABLE JAMES C. CROUCH,
Judge, Circuit Court, Douglas
County, Missouri,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

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No. 80-927

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ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Missouri on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE RULE OF COURT INVOLVED AND THE NATURE OF THE CASE

A. The Rule

This appeal raises the question of the validity of a certain Missouri rule of criminal procedure in effect at the time of appellant's preliminary hearing, specifically, Rule

23.08, V.A.M.R. (1979). See appellant's jurisdictional statement at p. 6. Although Rule 23.08 is not technically a state statute, as required by 28 U.S.C. § 1257 (2), appellee recognizes that this Court's jurisdiction can be invoked when there is drawn into question the validity of a statute or an authority exercised under the state because of repugnance to the United States Constitution. *Live Oak Water Users' Ass'n et al. v. Railroad Commission of State of California et al.*, 269 U.S. 354, 46 S.Ct. 149, 70 L.Ed. 305 (1926). Under the Missouri Constitution, specifically, Article V, § 5, the Supreme Court of Missouri is authorized to establish rules relating to practice, procedure and pleadings for all Missouri courts and administrative tribunals. Furthermore, the Missouri Constitution mandates that these rules be given the force and effect of law.

Missouri Rule 23 provides for preliminary examination in felony cases in which an indictment has not been filed. Rule 23.08 charges a magistrate judge with the responsibility of determining whether or not there exists probable cause for charging an accused with a felony. If it appears that *a* felony has been committed and there is probable cause to believe that the accused is guilty, Rule 23.08 requires the magistrate to bind the accused over to the Circuit Court.

B. The Proceedings Below

On July 17, 1979, the prosecuting attorney of Douglas County, Missouri, filed a complaint in the Circuit Court of Douglas County, charging appellant with the capital murder of one Charles M. Pollaty. On November 7, 1979, a preliminary hearing on the complaint was held, the Honorable Clyde Rogers, Judge, Circuit Court of Ozark County, Missouri, presiding. Judge Rogers bound appellant over to Circuit Court after having found probable cause to believe

appellant guilty of the crime of second degree murder. Judge Rogers' finding in this regard can be found at page 2 of the opinion of the Missouri Supreme Court, included in the appendix to appellant's jurisdictional statement.

On November 14, 1979, the prosecuting attorney of Douglas County filed an information in the Circuit Court of Douglas County charging appellant with the crime of capital murder. The prosecutor based his action upon the holding of the Missouri Supreme Court in *State v. Ancell,* 62 S.W.2d 443 (Mo. 1933), which provides that a magistrate, upon preliminary examination, bind a defendant over to the Circuit Court upon finding "that a felony had been committed and that there is probable cause to believe the prisoner guilty thereof." Appellant filed a motion to quash the information which was overruled by the respondent, the Honorable James C. Crouch, Judge, Circuit Court of Douglas County, Missouri.

Appellant then filed a petition for a writ of prohibition in the Missouri Court of Appeals, Southern District. The Missouri Court of Appeals denied appellant's petition on January 14, 1980. Soon thereafter, on January 21, 1980, appellant filed a petition for writ of prohibition in the Missouri Supreme Court. A preliminary rule in prohibition and order to show cause was entered by the Missouri Supreme Court on February 11, 1980.

On July 15, 1980, the Missouri Supreme Court, in an opinion styled *State ex rel. Thomas v. Crouch,* 603 S.W.2d 532 (Mo. banc 1980), upheld the action of respondent and quashed its preliminary rule in prohibition. After appellant's motion for rehearing was denied by the Missouri Supreme Court, a notice of appeal to this Court was filed in the Missouri Supreme Court.

II.

ARGUMENT

The Case Presents No Substantial Questions

Appellant's first question presented to this Court presents no substantial federal question because the argument that Rule 23.08, V.A.M.R. (1979), in effect at the time of appellant's preliminary hearing, is repugnant to the United States Constitution was not raised in the Missouri Supreme Court. Moreover, the issue was not addressed by the Missouri Supreme Court in its opinion (the judgment appealed from) rendered in *State ex rel. Thomas v. Crouch,* 603 S.W.2d 532 (Mo. banc 1980).

In *Fuller v. Oregon,* 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed. 2d 642 (1974), this Court held that due process claims concerning an Oregon recoupment statute, O.R.S. 161.665, which were not raised in the State Court and were not addressed by the Oregon Court of Appeals, could not be reached in the United States Supreme Court. It should be noted that the issue raised in the first question presented by appellant's jurisdictional statement, to-wit: That Rule 23.08 is repugnant to the Fourteenth Amendment due process and equal protection clauses, was never raised by appellant in his brief filed in the Missouri Supreme Court. See appellee's appendix A. Appellant argued only that the potential existed for his Fourteenth Amendment rights to be violated due to the fact that, in Missouri, capital murder is generally a nonbailable offense. The issue regarding bail is raised by appellant in his second question presented to this Court.

Moreover, the federal constitutional issue raised in the first question presented by appellant's jurisdictional state-

ment was not addressed by the Missouri Supreme Court in its Opinion in *State ex rel. Thomas v. Crouch, supra.* As evidenced by the Missouri Supreme Court's opinion, appellant's only argument in connection with Rule 23.08 alleged that the Circuit Court acted in excess of its jurisdiction in attempting to arraign and try appellant on a charge of capital murder because the finding at the preliminary hearing that there existed no probable cause to charge capital murder was binding upon the prosecuting attorney and, therefore, the information charging that offense is void. The Missouri Supreme Court disposed of appellant's argument by holding that, under both Rule 23.08 and established Missouri case law, specifically, *State v. Ancell,* 333 Mo. 26, 62 S.W.2d 443 (1933), the judge who presided at the preliminary hearing had no authority to be more specific, in his probable cause findings, than Missouri law allows. The court correctly pointed out that under Missouri law the judge only has the power to determine whether or not probable cause exists that *a* felony has been committed by the accused. Since the judge had no authority to find that there existed no probable cause to charge capital murder, the court concluded that the finding in that regard was void and the prosecuting attorney was entitled to disregard such limitation upon his discretion in selecting the charge, within the complaint, which he would file.

Although appellant made additional arguments as to why the prosecuting attorney should be bound by the judge's determination that no probable cause existed for charging capital murder, these arguments were simply attempts to distinguish appellant's case from *State v. Ancell, supra.* Again, the Missouri Supreme Court's opinion is evidence of this fact. Consequently, according to *Fuller v. Oregon, supra,* this Court cannot reach appellant's Fourteenth Amendment claim.

It is clear that the Missouri Supreme Court's opinion rendered in *State ex rel. Thomas v. Crouch, supra,* rested upon the construction of Missouri Rule 23.08 and not upon the validity of the rule. As such, appellant presents no federal question for this Court to review. *U.S. v. Thirty-seven (37) Photographs,* 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed. 2d 822 (1971); *Snell v. Chicago,* 152 U.S. 191, 14 S.Ct. 489, 38 L.Ed. 408 (1894); and *Grand Gulf R. Co. v. Marshall,* 53 U.S. 165, 12 How. 165, 13 L.Ed. 938 (1851). Furthermore, this Court has consistently held that it is bound to accept interpretations of state law made by the highest court in the state. *Hortonville Joint School District No. 1 v. Hortonville Ed. Ass'n,* 426 U.S. 42, 96 S.Ct. 2308, 49 L.Ed. 2d 1 (1976).

Appellee submits that appellant simply raises no federal constitutional question in his first issue presented by his jurisdictional statement. Although he alleges that his Fourteenth Amendment rights have been abrograted, the mere allegation of such does not make it so. The facts which he presents to this Court in support of his argument simply do not reach his constitutional claim. In reality, appellant is complaining of a Missouri rule of criminal procedure (Rule 23.08) which for many years has limited magistrate judges in Missouri in their probable cause findings.

In this case, the rule promulgated by the Missouri Supreme Court (and interpreted by that court in the decision appellant now seeks to review) permits the magistrate judge to determine only whether or not probable cause exists that the accused committed any felony. If so, the magistrate is charged with the duty of binding the accused over to Circuit Court for trial. The issue therefore is simply one of a state court's interpretation of its own rule. Appellant has cited no case wherein an accused was held to be possessed of a federal right mandating

that he be afforded a preliminary determination of probable cause specifying the highest degree of an offense which can be charged. It is elementary, if not axiomatic, that the due process clause of the Fourteenth Amendment does not control methods of state procedure or give jurisdiction to this Court to review mere errors of law alleged to have been committed by state court in the performance of its duties within the scope of its authority concerning matters nonfederal in character. *McDonald v. Oregon,* 233 U.S. 665, 34 S.Ct. 772, 58 L.Ed. 1145 (1914).

Apparently, appellant is operating under the misapprehension that he has been arbitrarily and capriciously denied some right which other defendants in the State of Missouri have been afforded. However, the Missouri Supreme Court, in *State ex rel. Thomas v. Crouch, supra,* unequivocally stated that no one standing accused of a felony has the right to a determination of probable cause more specific than one which determines whether or not *a* felony has been committed.

In the second question presented by appellant's jurisdictional statement it is alleged that appellant's Fourteenth Amendment rights to due process and equal protection were violated because, the potential exists for appellant being denied bail prior to trial. Appellant correctly points out that Article I, § 20 of the Missouri Constitution grants every criminal defendant the right to bail in all cases, except for capital offenses where the proof is evident or presumption great that the appellant committed capital murder. Appellant reasons that, although he is currently admitted to bail the possibility exists that he will be denied bail because the prosecutor has filed a capital murder charge in Circuit Court. Appellant reaches for a federal question by arguing that, since this Court has held that convicted felons are entitled to a judicial determination akin to a preliminary hearing before any deprivation of

liberty occurs with regard to the revocation of parole or probation, the magistrate's determination that probable cause existed only to charge second degree murder in the instant case effectively precluded an outright denial of bail under Article I § 20 of the Missouri Constitution and consequently, although appellant is currently admitted to bail, the prosecuting attorney's action in filing a capital murder information constitutes a possible denial of appellant's liberty interest in that bail may be denied because appellant stands charged with capital murder.

If a federal question is raised by appellant's second question presented, appellee is unable to discern it. The Missouri Supreme Court, in this regard, correctly points out that appellant's argument is speculative, at best, and incorrectly assumes that the filing of an information charging a capital offense precludes release on bail. See Article I, § 20, Missouri Constitution; and *Hickman v. O'Connell*, 266 S.W.2d 9 (Mo.App. 1954). In any event, the magistrate's determination that probable cause existed to support charging appellant with *a* felony, his more specific finding notwithstanding, is sufficient to insure federal due process protection. That appellant might at some future point in time be denied the right to be admitted to bail is at best speculative.

Appellee recognizes that there exists the possibility that this Court will find that appellant does not raise a constitutional question involving the validity of a state statute. Because review of constitutional questions which do not involve the validity of state statutes may be had in the Supreme Court only by a writ of certiorari, *Howell v. Jones*, 516 F.2d 53, *reh. denied*, 521 F.2d 815, *cert. denied*, 424 U.S. 916, 96 S.Ct. 1116, 47 L.Ed. 2d 321, *reh. denied*, 425 U.S. 945, 98 S.Ct. 1687, 48 L.Ed. 2d 189 (1975), appellee submits that certiorari should not be granted because no federal constitutional question is presented. It would be

premature at this point for this Court to consider whether or not appellant's constitutional rights have been violated since he has not even been tried for the offense of which he stands charged. Should appellant be convicted, any such issues could be presented to the Missouri Court of Appeals and then to this Court by way of direct appeal or certiorari. Since the Writ of prohibition filed by respondent in the Supreme Court could only test the jurisdiction of the Circuit Court to proceed with the capital murder charge, only questions regarding the Circuit Court's jurisdiction to proceed were addressed by the Supreme Court in *State ex rel. Thomas v. Crouch, supra.* Consequently, any allegations of constitutional deprivation by appellant need not be addressed by this Court unless, and until, appellant is convicted.

III.

CONCLUSION

WHEREFORE, appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Missouri.

Respectfully submitted,

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APPENDIX

IN THE

Supreme Court of Missouri

No. 61932

STATE OF MISSOURI, *ex. rel.* HOWARD LEE THOMAS,
Relator,

vs.

THE HONORABLE JAMES C. CROUCH,
Judge of the Circuit Court,
Division I, Douglas County,
Ava, Missouri,
Respondent.

Petition for Original Writ of Prohibition

STATEMENT, BRIEF AND ARGUMENT OF RELATOR, STATE OF MISSOURI, EX REL. HOWARD LEE THOMAS

JURISDICTIONAL STATEMENT

This Petition for Original Writ of Prohibition arises out of a criminal prosecution, commenced by the filing of an information in the Circuit Court of Douglas County, Missouri, charging relator with capital murder in the shooting death of one Charles M. Polatty. Relator filed a Motion to Quash that information on the ground that he had been discharged upon the crime of capital murder at the preliminary hearing held before the Honorable Clyde Rogers, Associate Circuit Judge of Ozark County, Missouri, on Wednesday, November 7, 1979. That mo-

tion was overruled in due course and the cause was set for arraignment before the Honorable James C. Crouch, Judge of the Circuit Court of Douglas County, Missouri. Relator thereupon filed his petition for original writ of prohibition in the Missouri Court of Appeals, Southern District, on January 14, 1980, seeking to prevent respondent from proceeding to arraign and try relator on the information charging capital murder. The Missouri Court of Appeals, Southern District, denied relator's petition on January 14, 1980. Relator then filed his petition for original writ of prohibition and suggestions in support thereof in this Court on January 21, 1980, and his supplemental suggestions in support of his petition were filed on January 29, 1980. A preliminary writ of prohibition was issued by order of this Court dated February 11, 1980. Relator now seeks to have the preliminary writ made permanent. Jurisdiction of the Supreme Court is founded under and pursuant to Article 5, Section 4, Constitution of Missouri, as amended in 1976, and upon Section 530.020 R.S.Mo. 1978.

STATEMENT OF FACTS

On July 17, 1979, a complaint was sworn out by Mr. Bob House, Prosecuting Attorney, Douglas County, Missouri, charging relator, Howard Lee Thomas, with capital murder in the shooting death of one Charles M. Polatty. A preliminary hearing on the complaint was held in the Associate Division of the Circuit Court of Douglas County, Missouri, on Wednesday, November 7, 1979, before the Honorable Clyde Rogers, Associate Circuit Judge of Ozark County, Missouri, sitting by designation after the disqualification of the Associate Circuit Judge of Douglas County, Missouri. At the preliminary hearing, the state presented the testimony of Mr. Leonard Sanders, Sheriff of Douglas County, Missouri (Tr. 4) and Mr. Herbert L. Bunch (Tr. 27) in an attempt to establish probable cause to hold relator on the charge of capital murder. Sheriff Sanders testified concerning his examination of the scene after the shooting

(Tr.6-12) and the appearance of relator at the scene (Tr. 17, 19-21). Mr. Bunch testified that he and the deceased, Mr. Polatty, were employed by relator to drive two vehicles from Springfield, Missouri to Douglas County (Tr. 26-30). Mr. Bunch also testified as to certain mechanical problems with one of the vehicles that occurred in route to Douglas County (Tr. 32-37) and as to several arguments and altercations between relator and the deceased as a result of these breakdowns (Tr. 54-65). Mr. Bunch further testified as to the shooting itself (Tr. 37-38, 66-72).

After hearing the evidence, the Honorable Clyde Rogers made the following findings:

> "The evidence must be viewed in the strongest possible light in the favor of the State of Missouri ....
>
> For this reason and from the evidence the state has presented, the court has no trouble in finding that there is probable cause to believe that the defendant shot the deceased, Mr. Polatty (Tr. 82) .... The court does not believe that there is any evidence to show deliberation, possibly no evidence to show premeditation on the part of the defendant (Tr. 82, 83) ... The Court finds that the elements of premeditation and deliberation do not exist and, therefore, it is not capital murder (Tr. 83) ... The Court finds that there is probable cause to believe that the defendant is guilty of having committed the crime of second degree murder in Douglas County, and that he should be held for arraignment in action of the Circuit Court, Division I (Tr. 84)."

Despite these express findings by the Associate Circuit Judge at the preliminary hearing, the Prosecuting Attorney of Douglas County, Missouri, thereafter filed an information in the Circuit Court of Douglas County, Missouri, on November 14, 1979, charging relator with the crime of capital murder. Relator thereupon filed a motion to quash the information, alleging that

he was being held to answer a charge for which he had been discharged at the preliminary hearing. Respondent's motion to quash was overruled by the Honorable James C. Crouch, Judge of the Circuit Court of Douglas County, Missouri, on or about January 2, 1980, and the cause was set down for arraignment of relator on Monday, January 14, 1980 on the charge of capital murder.

Relator then filed his petition for writ of prohibition in the Missouri Court of Appeals, Southern District, on or about January 14, 1980, seeking to prohibit the respondent, the Honorable James C. Crouch, for proceeding to arraign and try relator on the information charging capital murder, which petition was denied on January 14, 1980. Respondent then entered his order, upon motion by relator, staying the arraignment of relator pending the decision of this Court on relator's petition for writ of prohibition. Said petition and relator's suggestions in support were filed in this Court on January 21, 1980. Relator's supplemental suggestions in support of his petition for writ of prohibition were filed in this Court on January 29, 1980.

A preliminary rule in prohibition and order to show cause was entered by this Court on February 11, 1980, and respondent's return to the preliminary rule in prohibition and suggestions in opposition to relator's writ of prohibition were filed on March 3, 1980.

POINTS AND AUTHORITIES

I.

The Trial Court Is Proceeding In Excess Of Its Jurisdiction In Attempting To Arraign And Try Relator On The Information Charging Capital Murder, Because The Associate Circuit Judges' Finding At The Preliminary Hearing, That Capital Murder Had Not Been Committed, Was Binding Upon The Prosecuting Attorney, So That The Information Filed Thereafter Was Void, And The Jurisdiction Of The Trial Court Is Founded On The Filing Of A Valid Information.

State of Missouri v. **Ancell**, 62 S.W.2d 443 (Mo. 1933);

State of Missouri v. **Admire**, 495 S.W.2d 132 (Mo. App. 1973);

State of Missouri v. **Clark**, 546 S.W.2d 455 (Mo. App. 1977);

Section 544.250 R.S.Mo. 1978;

Section 482.090 R.S.Mo. 1949;

State of Missouri v. **Savage**, 461 S.W.2d 887 (Mo. Banc 1971);

Matter of v. , 306 S.W.2d 461 (Mo. Banc 1957);

State, ex rel. Pennsylvania Railroad Co. v. **Blocher**, 238 S.W.2d 361 (Mo. 1951);

State of Missouri v. **Morgett**, 526 S.W.2d 434 (Mo. App. 1975);

State, ex rel. Board of Education v. **Nast**, 108 S.W. 563 (Mo. 1908);

State v. **Turner**, 223 Kan. 707, 576 P.2d 644 (1978).

II.

The Trial Court Is Proceeding In Excess Of Its Jurisdiction In Attempting To Arraign And Try Relator On The Information Charging Capital Murder, In That The Information Was Filed Without A Judicial Determination Of Probable Cause For The Charge Of Capital Murder, And Relator Will Be Deprived Of His Right To Bail In Violation Of Article 1, Section 20 Of The Missouri Constitution If The State Is Allowed To Proceed Under The Information Charging Capital Murder, A Nonbailable Offense.

Missouri Constitution Article I, Section 20;

State of Missouri v. **Clark**, 546 S.W.2d 455 (Mo. App. 1977);

State of Missouri v. **Admire**, 495 S.W.2d 132 (Mo. App. 1973);

III.

The Trial Court Is Proceeding In Excess Of Its Jurisdiction In Attempting To Arraign And Try Relator On The Information Charging Capital Murder, In That The Information Was Filed Without A Judicial Determination Of Probable Cause For The Charge Of Capital Murder, And Relator Will Be Deprived Of His Liberty Without Due Process Of Law In Violation Of The Fourteenth Amendment To The United States Constitution And Article 1, Section 10 Of The Missouri Constitution, In That Relator Is Currently Free On Bail, But If The Information Charging Capital Murder, A Nonbailable Offense, Is Allowed To Stand, Relator's Freedom Will Be Terminated Without Any Judicial Determination Of Probable Cause For Such Termination.

U.S. Constitution, Amendment 14;

Missouri Constitution, Article 1, Section 19;

Gagnon v. Scarpelli, 411 U.S. 778 (1973);

Morrisey v. Brewer, 408 U.S. 471 (1972).

IV.

The Trial Court Is Proceeding In Excess Of Its Jurisdiction In Attempting To Arraign And Try Relator On The Information Charging Capital Murder, In That The Information Was Filed Without A Judicial Determination Of Probable Cause For The Charge Of Capital Murder, And Relator Will Be Deprived Of His Right To Equal Protection Of The Laws In Violation Of The Fourteenth Amendment To The United States Constitution And Article 1, Section 2 Of The Missouri Constitution If The Information Is Allowed To Stand, In That Relator Will Be Held To Answer For A Felony, Namely Capital Murder, Involving A Mandatory Minimum Prison Sentence, At The Sole Discretion Of The Prosecuting Attorney Without Benefit Of A Judicial Determination Of Probable Cause For Such Charge.

U.S. Constitution, Amendment 14;

Missouri Constitution, Article 1, Section 2;

Section 565.008 R.S.Mo. 1978;

Berra v. United States, 351 U.S. 131 (1955);

Hutcherson v. United States, 345 F.2d 964 (D.C. Cir. 1965).

V.

The Trial Court Is Proceeding In Excess Of Its Jurisdiction In Attempting To Arraign And Try Relator On The Information Charging Capital Murder, In That The Information Was Filed Without A Judicial Determination Of Probable Cause For The Charge Of Capital Murder, And Relator Will Be Held Twice In Jeopardy For The Same Offense In Violation Of The Fifth And Fourteenth Amendments To The United States Constitution, And In Violation Of Article 1, Section 19 Of The Missouri Constitution If The Information Is Allowed To Stand, In That Relator Was Discharged On The Offense Of Capital Murder At The Preliminary Hearing, But Is Now Being Held To Answer On That Same Charge Without Benefit Of A Judicial Determination Of Probable Cause To Hold Relator For Such Offense.

U.S. Constitution, Amendment 5, and 14;

Missouri Constitution, Article 1, Section 19;

State of Missouri v. **Clark**, 546 S.W.2d 455 (Mo. App. 1977);

ARGUMENT

I.

The Trial Court Is Proceeding In Excess Of Its Jurisdiction In Attempting To Arraign And Try Relator On The Information Charging Capital Murder, Because The Associate Circuit Judges' Finding At The Preliminary Hearing, That Capital Murder Had Not Been Committed, Was Binding Upon The Prosecuting Attorney, So That The Information Filed Thereafter Was Void, And The Jurisdiction Of The Trial Court Is Founded On The Filing Of A Valid Information.

The express findings of the Associate Circuit Judge at the preliminary hearing, that capital murder had not been committed, established the parameters of the jurisdiction of the circuit court, and the confines within which the Prosecuting Attorney of Douglas County, Missouri, could lawfully act. The action of the prosecuting attorney in ignoring the express findings of the court was improper and voided the information; thus, the circuit court is proceeding in excess of its jurisdiction in taking cognizance of the information in question.

The right to a preliminary hearing is accorded a criminal defendant in this state before an information charging him with any felony may be filed. Section 544.250 R.S.Mo. 1978. The purpose of that preliminary hearing is to determine whether there is "probable cause to believe that a felony has been committed and that the defendant has committed it ..." Rule 22.07(c). Underlying this rule is a concern to protect individuals from groundless prosecution or abuse of prosecutorial discretion. Evidencing this concern are recent decisions upgrading the status of the preliminary hearing to a constitutionally protected "critical stage" of a criminal prosecution, encompassing the right to counsel and the right to confront witnesses against oneself. **State** v. **Morgett**, 526 S.W.2d 434 (Mo. App. 1975).

Relator was accorded a preliminary hearing in this prosecution on the complaint charging him with capital murder. However, at that preliminary hearing, the Associate Circuit Judge expressly found that the State had failed to present sufficient evidence of premeditation and deliberation, and that capital murder had not, therefore, been committed (Tr. 83). Rather, the Court bound defendant over for arraignment and trial on the lesser offense of second degree murder (Tr. 84). The prosecuting attorney chose to ignore those express findings and filed an information charging relator with capital murder; upon which information the respondent proposes to arraign and try relator. The position of the respondent and the prosecuting attorney is that because the Associate Circuit Judge found probable cause to believe a felony was committed, then the prosecuting attorney is free to determine the precise degree of the crime upon which the relator will be tried, under **State** v. **Ancell**, 62 S.W.2d 443 (Mo. 1933). Relator urges the Court to recognize that the decision in **State** v. **Ancell**, id., does not comport with the recently upgraded status of the preliminary hearing. Further, advances in the stature and qualifications of the officer presiding at the preliminary hearing, and judicial recognition that the Associate Circuit Judge's findings at the preliminary hearing are binding, have eroded the reasons for the rule set out in **State** v. **Ancell**. Relator submits that upon a critical examination of **State** v. **Ancell**, the Court must conclude that it should not be followed in the instant case and that the information herein should be quashed.

In **State** v. **Ancell**, id., the defendant was charged with first degree murder, but the Justice of the Peace at the preliminary hearing bound defendant over on a charge of second degree murder. The prosecuting attorney thereafter filed an information charging first degree murder, and the defendant's plea in abatement challenging the validity of the preliminary hearing and the information was overruled. Defendant was tried on the information and convicted of manslaughter. The Supreme Court affirmed the conviction, stating:

> The complaint filed with the Justice in this case charged murder in the first degree, which charge included the lower degrees of felonious homicide, to-wit, murder in the second degree and manslaughter. The justice found that the felonious act charged, in other words, a felony charged in the complaint, had been committed. It was not incumbent upon him to determine the precise of the degree of the crime found to have been committed, nor, in our opinion, could his attempted determination thereof preclude the prosecuting attorney from filing an information charging the higher degree ...
>
> Moreover, the information charging murder in the first degree included the charge of murder in the second degree, on which defendant had been bound over and that of manslaughter, of which he was convicted. Had the information charged murder in the second degree, it would have included manslaughter just the same, the difference between the charge of murder in the first degree and one of murder in the second degree being that in the former, but not in the latter the elements of deliberation must be alleged. Under either the accused may be convicted of manslaughter if the evidence so warrants. So that in any event, defendant had a preliminary examination and was bound over to answer the charge on which he was convicted.

State v. Ancell, *supra*, is distinguishable in several respects from the present case. First, in Ancell it is not clear what finding was made by the Justice of the Peace with regard to the first degree murder charge. In binding the defendant over on the charge of second degree murder, the opinion does not indicate that the Justice of the Peace in State v. Ancell, *supra*, made any express finding as to the existence of evidence of premeditation and deliberation, or as to the strength of any such evidence. However, in the present case, the Associate Circuit Judge made

an express finding that no such evidence had been produced by the State, and that there was no probable cause to believe relator guilty of the crime of capital murder (Tr. 83).

Secondly, in State v. **Ancell**, *supra*, the Court was reviewing the propriety of the prosecutor's action after the defendant had been tried and convicted of manslaughter, a lesser included offense of the first degree murder charge contained in the disputed information. The real basis of the Court's holding in **Ancell**, *supra*, was that any error committed by use of the disputed information had been harmless to the defendant. Relator has not yet been tried on the information in question, and an information charging capital murder will have a greater adverse effect on the jury as regards relator's guilt or innocence, than would an information charging second degree murder. A distinct probability of prejudice to the relator by use of the disputed information exists in this case, and the Court cannot, at this time, determine that any such prejudice would be harmless to relator as could the Court in State v. **Ancell**, *supra*. Relator has sought to protect his right to a fair trial at the earliest possible opportunity. A decision in relator's favor will cause no undue hardship or burden to the state, as would have been entailed by a retrial of the case in State v. **Ancell**, *supra*.

In addition to the factual distinctions between State v. **Ancell**, *supra*, and the present case, developments in the constitutional law and common law in Missouri since State v. **Ancell**, *supra*, was decided in 1933, require a revision of the rules set out in State v. **Ancell**, *supra*. The increasingly important nature of the preliminary hearing itself, and the expanded procedural safeguards that today are necessarily incident thereto were recognized in State v. **Morgett**, *supra*. The court in **Morgett**, *supra*, stated that "by virtue of the profoundly important nature of the determination to be made by the magistrate at the preliminary hearing stage and the procedural safeguards surrounding an accused with respect thereto, the preliminary hear-

ing in a felony prosecution to be initiated by information is a "critical state" of the criminal process and an accused's right to counsel thereat reaches constitutional proportions".

Further, the preliminary hearing today is not a full judicial proceeding, presided over by an Associate Circuit Judge, in marked contrast to the situation at the time **State** v. **Ancell,** *supra*, was decided, when the preliminary hearing was conducted by a Justice of the Peace and no constitutional safeguards were applied to protect an accused. A Justice of the Peace in 1933 was not required to be licensed to practice law in the State of Missouri, and his jurisdiction was limited to the trial of certain civil matters and criminal misdemeanors. His role at the preliminary hearing, while involving a judicial function in determining probable cause to hold a defendant for trial, was held not to constitute the use of "judicial power" under Article 3 of the Missouri Constitution of 1875. **State, ex rel. Board of Education of City of St. Louis** v. **Nast,** 108 S.W. 563 (Mo. 1908). Prior to the adoption of the constitution of 1945, Justice of the Peace courts were not courts of record, and as such were limited even in the extent to which a justice could order discovery. **State, ex rel. Pennsylvania Railroad Co.** v. **Blocher,** 238 S.W.2d 361 (Mo. 1951).

With the adoption of the Missouri Constitution of 1945 and Section 517.050 R.S.Mo.1949, the Justice of the Peace was upgraded to the status of Magistrate Judge and the Magistrate Court became a court of record. Article 5, Section 25 of the Constitution of 1945 required that Magistrate judges be licensed to practice law in the State of Missouri, except that former justices of the peace, with at least four years seniority were eligible for the office of Magistrate without being so licensed. As a court of record, the Magistrate Court enjoyed an expanded jurisdiction and judicial power. Section 482.090 R.S.Mo. 1949, raised the amount in controversy over which Magistrate Courts had jurisdiction and the case law recognized the power of the Magistrate Court as a court of record to issue writs, and compel

discovery. State v. Savage, 461 S.W.2d 887 (Mo. Banc. 1971). However, "the jurisdiction of the Magistrate Court in criminal matters was limited to misdemeanors and preliminary examinations in felony cases, while the circuit courts had concurrent jurisdiction over misdemeanors and exclusive jurisdiction of felonies". Matter of v. , 306 S.W.2d 461 (Mo. Banc 1957).

The amendments to the Missouri Constitution adopted in 1976 created the position of Associate Circuit Judge to take the place of Magistrate Judges. Under Article 5, Section 21, of the Missouri Constitution as amended, the Associate Circuit Judge is still required to have a license to practice law in Missouri. A more important provision, however, is Article 5, Section 17 of the Missouri Constitution as amended, which states that the jurisdiction of the Associate Circuit Judge shall be the same as that previously entrusted to Magistrate and Probate Court judges, except that the Associate Circuit Judge may be assigned such additional cases or classes of cases as are provided by law. It is significant to note that Section 478.225 R.S.Mo. 1978 provides that "Associate Circuit Judges may hear and determine such cases or classes of cases which are transferred or assigned to them" pursuant to statutory or constitutional authority. Thus, the Associate Circuit Judge may be assigned to hear and determine any case which a Circuit Judge could hear under this latest expansion of inferior court jurisdiction.

The upshot of this series of expansions of inferior court jurisdiction and tightening of qualifications for inferior court judges is that the Associate Circuit Judge is much better prepared and qualified to make decisions concerning the credibility and weight of evidence produced at a preliminary hearing than was a justice of the peace at the time State v. Ancell, *supra*, was decided. Relator submits that a major reason for restricting the justice of the peace's power to bind a criminal prosecution by his finding at the preliminary hearing was that the Justice of the peace generally had neither the legal qualifica-

tions nor trial experience to make the difficult distinctions necessary to determine the precise degree of an offense charged in a complaint. However, the present day Associate Circuit Judge is eminently qualified to make such determinations and distinctions by reason of his expanded trial experience and jurisdiction, and Missouri Courts have so recognized on several occasions. In **State** v. **Admire**, 495 S.W.2d 132 (Mo. App. 1973), the Court stated "the magistrate is the sole judge of the competency of evidence offered in the hearing before him and the weight to be given it, and, in the absence of fraud or purely arbitrary or malicious action by the justice, his finding is conclusive and cannot be reviewed by any other Court". Similarly, in **State** v. **Clark**, 546 S.W.2d 455 (Mo. App. 1977), the court ruled that the magistrate is the sole judge of the sufficiency of the evidence adduced at the preliminary hearing on the issue of probable cause. The court also stated that "the preliminary examination is nonetheless a judicial proceeding and insofar as the magistrate acts within a lawful jurisdiction, his decision on the evidence binds the proceeding when it is wrong as when it is right ...".

The decision of the Honorable Clyde Rogers, Associate Circuit Judge of Ozark County, Missouri, that the State's evidence produced at realtor's preliminary hearing did not support a charge of capital murder was binding on the subsequent criminal prosecution under the decisions noted above. Those findings were not reviewable by the appellate courts. Those findings were also binding upon the prosecuting attorney and the respondent, and their action in proceeding in direct contravention to the findings of the Associate Circuit Judge must be found to be improper.

Both the instant case and **State** v. **Ancell**, *supra*, are distinguishable from the factual setting and the decision in **State** v. **Clark**, *supra*. Relator does not quarrel with the result reached in **State** v. **Clark**. There the defendant was bound over on a charge of first degree murder and an information was filed

charging first degree murder. Subsequently, the information was amended to charge to second degree murder, and at trial, the defendant was convicted of manslaughter. The appellate court found no error in the information, stating that "an information filed after a preliminary hearing has been held does not have to correspond with the complaint filed with the magistrate ... the prosecuting attorney is authorized to file an information charging the offense for which the accused was held, or substantially the same offense. He may not add a new offense and he may not file an information charging an offense completely different from that shown on the preliminary hearing". In **State** v. **Clark**, *supra*, the issue was whether the prosecutor could charge a **lesser** degree of offense in the information than the offense for which the accused was bound over, while in the present case, the issue is whether the prosecutor may charge a **greater** offense in the information than that found by the magistrate at the preliminary hearing. It is only where the prosecuting attorney attempts to ignore the express findings of the Associate Circuit Judge at the preliminary hearing and file an information charging a greater degree of offense than that found at the preliminary hearing that his action is improper. The rule of **State** v. **Ancell**, *supra*, that the prosecuting attorney has discretion to determine the degree of the felony after the preliminary hearing, is incorrect only insofar as it allows the prosecutor to unilaterally increase the degree of the offense following the preliminary hearing.

The implications of such unbridled prosecutorial discretion are much more onerous for a defendant charged with capital murder than for a defendant in other felony cases. A charge of capital murder involves a grave risk of prejudice before a jury, and affects the defendant's right to bail under theMissouri Constitution. Such a charge also affects a defendant's liberty interests in that a mandatory minimum period of i carceration without possibility of parole is involved, as is the possibility of the death penalty.

Relator would respectfully submit to the Court that in light of the express finding by the Associate Circuit Judge at the preliminary hearing, which has been held to be binding on the criminal prosecution, the Court should critically examine the holding in **State** v. **Ancell**, *supra*, and overrule it insofar as it allows the prosecuting attorney to ignore the court's express findings at the preliminary hearing and increase the offense charged from second degree murder to capital murder following the preliminary hearing. Relator would again direct the court's attention to the cases from other jurisdictions cited in Relator's Suggestions in Support of Relator's Petition for Writ of Prohibition heretofore filed in this Court which strongly and convincingly indicate that such prosecutorial action is improper. Relator contends that the Missouri decisions of **State** v. **Admire**, *supra*, and **State** v. **Clark**, *supra*, which hold that the findings of the Associate Circuit Judge at the preliminary hearing are binding, compel this Court to adopt the position announced in **State** v. **Turner**, 223 Kan. 707, 576 P.2d 644 (1978). The court therein held that "the examining magistrate's function at a preliminary examination is to determine probable cause. When the examining magistrate errors in this function by failing to bind the defendant over to the district court for trial on a charge which is warranted by the evidence, the State's only remedy is to dismiss and file another case". Relator believes the Associate Circuit Judge's findings at the preliminary hearing concerning the issues of premeditation and deliberation were correct. However, the findings of the Associate Circuit Judge are binding when erroneous to the same extent as when they are correct. The prosecuting attorney is not free to disregard the Associate Circuit Judge's findings and substitute a charge of capital murder for the lesser offense upon which relator was bound over for trial. Such action on the part of the prosecutor voids the information, and as the jurisdiction of the circuit court to try relator for a felony derives from the formal accusation of relator by valid indictment or information, **State** v. **Clark**, *supra*, the circuit court has no jurisdiction to arraign and try relator on the information as presently filed.

II.

The Trial Court Is Proceeding In Excess Of Its Jurisdiction In Attempting To Arraign And Try Relator On The Information Charging Capital Murder, In That The Information Was Filed Without A Judicial Determination Of Probable Cause For The Charge Of Capital Murder, And Relator Will Be Deprived Of His Right To Bail In Violation Of Article 1, Section 20 Of The Missouri Constitution If The State Is Allowed To Proceed Under The Information Charging Capital Murder, A Non-bailable Offense.

The prosecutor's action in filing an information charging capital murder, and respondent's action in taking cognizance of that information serve to deprive relator of his right to bail in contravention of Article 1, Section 20 of the Missouri Constitution. Article 1, Section 20 provides that "all persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great". The Associate Circuit Judge at the preliminary hearing ordered the relator bound over on a charge of second degree murder and provided for relator's release on bail. Relator has already pointed out under point one that recent Missouri case law clearly establishes that an Associate Circuit Judge's findings as to the sufficiency of the evidence are binding upon the proceeding and upon reviewing courts. **State** v. **Clark**, 546 S.W.2d 455 (Mo. App. 1977); **State** v. **Admire**, 495 S.W.2d 132 (Mo. App. 1973). The prosecuting attorney has unilaterally determined that a capital murder charge is warranted under the evidence in direction contravention to the findings of the Associate Circuit Judge who presided at the preliminary hearing. His action is increasing the charge to a capital offense may well serve to deprive relator of his constitutional right to be released on bail under the second degree murder charge as found by the Associate Circuit Judge.

However, if the information charging capital murder is allowed to stand, and the respondent determines that relator should be admitted to bail, the impropriety of the prosecuting attorney's action becomes all the more evident. By admitting relator to bail under a capital murder charge, the respondent will have implicitly found that, based upon the evidence adduced at the preliminary hearing, the proof is not evident and the presumption is not great that relator committed the crime of capital murder. Thus, the prosecuting attorney's determination that capital murder charges against relator are warranted will fly directly in the face of the findings of both the Associate Circuit Judge and the Circuit Judge. Such a result only serves to strengthen relator's argument under Point I that the prosecuting attorney should be bound by the findings of the Associate Circuit Judge at the preliminary hearing.

Any discretion that the prosecuting attorney may have in determining the precise degree of an offense upon which a criminal defendant will be tried, should not be expanded to allow a decision which may directly infringe on a defendant's constitutional rights. Relator, in the instant case, may very likely be deprived of his right to bail under the Missouri Constitution by the prosecuting attorney's actions. The action of the prosecuting attorney in filing an information charging the capital offense was improper, and the trial court is proceeding in excess of its jurisdiction in taking cognizance of the information and condoning any violation of relator's constitutional right to bail.

III.

The Trial Court Is Proceeding In Excess Of Its Jurisdiction In Attempting To Arraign And Try Relator On The Information Charging Capital Murder, In That The Information Was Filed Without A Judicial Determination Of Probable Cause For The Charge Of Capital Murder, And Relator Will Be Deprived Of His Liberty Without Due Process Of Law In Violation Of The Fourteenth Amendment To The United States Constitution And Article 1, Section 10 Of The Missouri Constitution, In That Relator Is Currently Free On Bail, But If The Information Charging Capital Murder, A Nonbailable Offense, Is Allowed To Stand, Relator's Freedom Will Be Terminated Without Any Judicial Determination Of Probable Cause For Such Termination.

Relator is currently free on bail, pursuant to the order of the Associate Circuit Judge entered at the preliminary hearing. Under the Judge's order, relator has a legitimate claim of right or entitlement to be free on bail. Capital murder, the offense charged in the information, is generally a nonbailable offense. To allow the information charging capital murder to go forward may effectively terminate relator's liberty without benefit of a judicial determination of probable cause for such termination.

The United Supreme Court has held that convicted felons are entitled to a judicial determination akin to a preliminary hearing, before any deprivation of liberty occurs with regard to the revocation of parole or probation. **Gagnon** v. **Scarpelli**, 411 U.S. 778 (1973); **Morrissey** v. **Brewer**, 408 U.S. 471 (1972). This court cannot allow relator, who is yet to be tried or convicted of any crime, to be deprived of his liberty without a similar judicial determination of probable cause for the deprivation. Yet, the action of the prosecuting attorney in filing an information charging capital murder and the respondent's concurrence in that action may effectively result in the deprivation of relator's liberty without due process of law in violation of the 14th Amendment to the United States Constitution and Article 1,

Section 10 of the Missouri Constitution. Relator submits that such action is in excess of respondent's jurisdiction and that a permanent rule in prohibition should therefore issue.

IV.

The Trial Court Is Proceeding In Excess Of Its Jurisdiction In Attempting To Arraign And Try Relator On The Information Charging Capital Murder, In That The Information Was Filed Without A Judicial Determination Of Probable Cause For The Charge Of Capital Murder, And Relator Will Be Deprived Of His Right To Equal Protection Of The Laws In Violation Of The Fourteenth Amendment To The United States Constitution And Article 1, Section 2 Of The Missouri Constitution If The Information Is Allowed To Stand, In That Relator Will Be Held To Answer For A Felony, Namely Capital Murder, Involving A Mandatory Minimum Prison Sentence, At The Sole Discretion Of The Prosecuting Attorney Without Benefit Of A Judicial Determination Of Probable Cause For Such Charge.

The Prosecuting Attorney of Douglas County has undertaken to make a sentencing decision by his action in increasing the charge in the information from second degree murder to capital murder. Capital murder is a unique offense under Missouri Law, in that Section 565.008 R.S.Mo. (1978), provides a mandatory minimum sentence of life imprisonment and excludes a defendant from eligibility for probation or parole until he has served a minimum of fifty years of his sentence. Thus, if the information in question is allowed to stand, relator will be required to answer for a felony, namely capital murder, potentially involving a mandatory minimum prison sentence without possibility of probation or parole, at the sole discretion of the Prosecuting Attorney of Douglas County without any judicial determination of probable cause for such a punishment. Justice Hugo Black stated in **Berra v. United States**, 351 U.S. 131, 100 L.Ed. 1013 (1955) (J. Black, dissenting):

> It is true that under our system Congress may vest a judge and jury with broad power to say how much punishment shall be imposed for a particular offense. But it is quite different to vest such powers in a prosecuting attorney. A judge and jury act under procedural rules carefully prescribed to protect the liberty of the individual. Their judgments and verdicts are reached after a public trial in which a defendant has the right to be represented by an attorney. No such protections are thrown around decisions by a prosecuting attorney. Substitution of the prosecutor's caprice for the ajudicatory process is an action I am not willing to attribute to Congress in the absence of a clear command. Our system of justice rests upon the concept of impersonality in criminal law . . .".

A similar concern was expressed in **Hutcherson** v. **United States**, 345 F.2d 964 (D.C.Cir. 1965) (C.J. Bazelon, concurring and dissenting), where Judge Bazelon stated:

> When the prosecutor choses a mandatory minimum sentence he makes a sentencing decision, without either sentencing information or expertise in sentencing.

The prosecutorial function is necessarily adverse to the interests of a criminal defendant. Our system of justice leaves to the judge and jury the question of guilt or innocence and the punishment to be imposed upon a guilty defendant. To allow a prosecuting attorney to ignore the court's findings as was done in the present case, and to unilaterally invoke the possibility of a mandatory minimum prison sentence, effectively allows the prosecuting attorney to make a sentencing decision. Such a result can occur in Missouri only when the prosecutor chooses to prosecute a defendant for capital murder rather than a lesser homicide. Thus, the prosecuting attorney's action in this case results in a violation of relator's right to equal protection of the laws under the 14th Amendment to the United States Constitution and Article 1, Section 2 of the Missouri Constitution, in

that relator is being denied the right to have his sentencing decision made by a judge and jury, a right accorded to all other criminal defendants under Missouri law.

Relator, therefore, submits that the action of the prosecuting attorney in filing the information charging capital murder was improper, and that the respondent is acting in excess of his jurisdiction in taking cognizance of said information and condoning this denial of relator's constitutional rights.

V.

The Trial Court Is Proceeding In Excess Of Its Jurisdiction In Attempting To Arraign And Try Relator On The Information Charging Capital Murder, In That The Information Was Filed Without A Judicial Determination Of Probable Cause For The Charge Of Capital Murder, And Relator Will Be Held Twice In Jeopardy For The Same Offense In Violation Of The Fifth And Fourteenth Amendments To The United States Constitution, And In Violation Of Article 1, Section 19 Of The Missouri Constitution If The Information Is Allowed To Stand, In That Relator Was Discharged On The Offense Of Capital Murder At The Preliminary Hearing, But Is Now Being Held To Answer On That Same Charge Without Benefit Of A Judicial Determination Of Probable Cause To Hold Relator For Such Offense.

The Associate Circuit Judge in this case found no probable cause to hold relator for the crime of capital murder, and implicitly discharged relator from liability for that offense. In State v. Clark, 564 S.W.2d 455 (Mo. App. 1977), the court held that the preliminary examination is a judicial proceeding and that the judge's decision on the evidence binds that proceeding. To allow the prosecuting attorney to disregard the judicial finding which discharged the relator of the offense of capital murder, and to allow him to file an information charging that

offense, would be to place relator again in jeopardy for the offense of capital murder without any preliminary hearing or judicial determination of probable cause to hold relator for that offense. Such a result constitutes a denial of relator's rights under the 5th and 14th Amendments to the United States Constitution, and under Article 1, Section 19, of the Missouri Constitution. Thus, the action of the prosecuting attorney in filing the information in question was improper, and the respondent is acting in excess of his jurisdiction in taking cognizance of that information and condoning this denial of relator's constitutional rights.

CONCLUSION

The Associate Circuit Judge at the preliminary hearing in this matter expressly found that capital murder had not been committed. That finding was binding upon the Prosecuting Attorney of Douglas County, upon the respondent, and upon reviewing courts. If the prosecuting attorney and respondent are allowed to disregard those express findings and are allowed to charge and try relator for whatever offense the prosecuting attorney feels is justified by the evidence, then there is little reason for affording a preliminary hearing to this relator or any other criminal defendant. Yet the right to a preliminary hearing is guaranteed to a criminal defendant by statute in this state. The inescapable conclusion is that the Prosecuting Attorney of Douglas County and respondent are proceeding in violation of defendant's statutory and constitutional rights and in excess of the jurisdiction lawfully conferred upon them, and are, therefore, subject to superintending control by this court by way of a permanent rule in prohibition.

Respectfully submitted,

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